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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6476

Supreme Court, U. S.
FILED

OCT 9 1973

MICHAEL RODAK, JR., CL

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

**BRIEF FOR RESPONDENT STATE COMMISSIONER
ABE LAVINE**

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Respondent
Abe Lavine*
Office & P. O. Address
2 World Trade Center
New York, New York 10047
(212) 488-6043

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
of Counsel

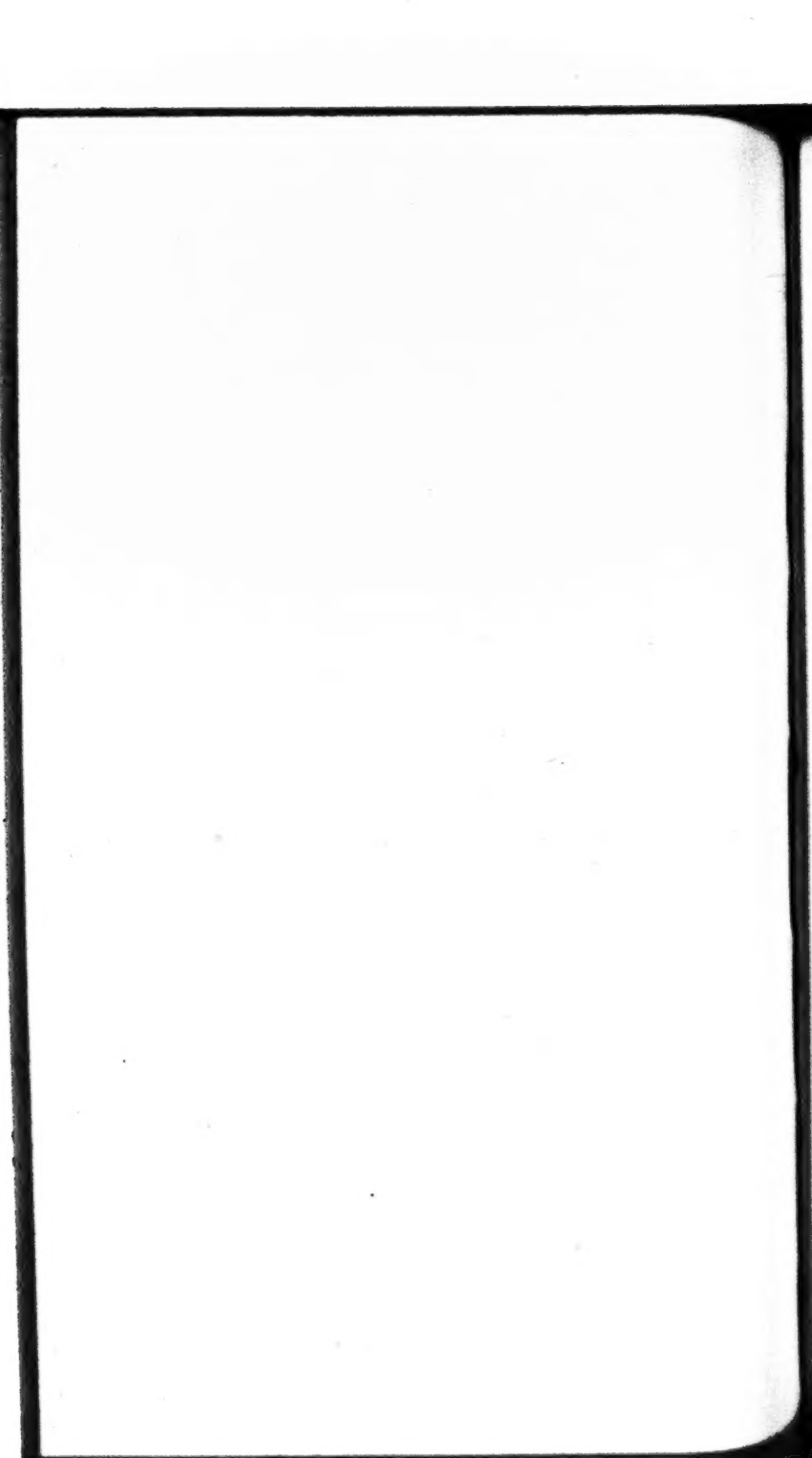


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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLLEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

BRIEF FOR RESPONDENT STATE COMMISSIONER ABE LAVINE

Questions Presented

1. Does petitioners' claim that they were denied equal protection of law because of a New York regulation requiring recoupment of a duplicate rent payment raise a substantial constitutional question sufficient to establish jurisdiction under 28 U.S.C. § 1343(3)?

2. Absent a substantial constitutional question, do the federal courts have jurisdiction of a claim alleging a violation of the Social Security Act under 28 U.S.C. §§ 1343(3) and (4)?

Statement of the Case

Petitioners¹ are recipients of Aid to Dependent Children under New York law. New York participates in the federal program of Aid to Families with Dependent Children (AFDC) under the Social Security Act of 1935 and provides a schedule of payments to these families based upon the number of individuals in a household. New York Social Services Law, § 131-a [McKinney Supp. 1972]. Petitioners thus receive monthly grants consisting of a shelter grant to pay for rent, a fuel grant to pay for heating, and a basic needs grant to pay for their other necessities.² Petitioners misappropriated their shelter grants and used the monies that were earmarked for rent for other purposes.³ Each was then threatened with eviction for non-

¹ In accordance with the rules of this Court, respondent will use the terms "petitioners" and "respondents" in referring to the parties. Petitioners' brief uses the terms "appellants" and "appellees".

² The schedule set forth in Section 131-a determines the basic needs grant on a state-wide basis. Each social service district establishes a maximum schedule of monthly shelter allowances which is added to the basic needs grant. In July, 1971, New York enacted a 10% ratable reduction in the level of benefits. This reduction was eliminated in 1973, effective January 1, 1974, and all recipients will then receive 100% of this standard of need. N.Y. Session Laws, L. 1973, Chap. 150.

³ Cynthia Hagans voluntarily chose to live in an apartment where the rent was higher than her shelter allowance. Bertha Grissett alleged that her check was stolen, and after the commencement of this action, the Nassau County Department of Social Services determined that it had improperly ordered recoupment from Mrs. Grissett and restored her full grant. [See A 80, fn. 2].

payment of rent and court proceedings were brought by the respective landlords.

The local Department of Social Services intervened in each case and paid the back rents of each of the named petitioners in order to forestall eviction. Pursuant to 18 NYCRR 352.7(g)(7), the amount of extra monies supplied by the local Department for back rents "shall be deducted from subsequent grants in equal amounts over not more than the next six months". The local department therefore deducted the extra monies allotted over the subsequent six months.*

A. The Initial District Court Proceeding

Petitioners brought the instant action pursuant to 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment [A 6]. They challenged the above regulation as denying them equal protection because recoupment of the extra payment resulted in their being treated differently from other recipients of public assistance who were not subjected to recoupment because they did not receive extra payments [A 13-14]. Their complaint additionally alleged that the regulation violated due process because it did not contain any standards regarding the circumstances resulting in non-payment [A 14]. Petitioners further claimed that the recoupment regulation violated 42 U.S.C. § 602(a)(7) and (a)(10) and the regulations promulgated thereunder as set forth in 45 C.F.R. § 233.20(a)(3)(ii)(c), because these provisions allegedly required that current needs of recipients must

* Cynthia Hagans had the full amount of her extra rent payment recouped in one month because she moved out of Nassau County the next month [A 34]. It is doubtful that such a determination by the County would ever have been sustained by the State, but Mrs. Hagans never requested a hearing before respondent Lavine contesting this allocation. She ultimately was reimbursed by Nassau County for the full amount of the money recouped.

always be met regardless of previous misallocations of welfare payments [A 12-13].

By order dated February 18, 1972, the District Court temporarily restrained respondents from implementing the aforesaid State regulation pending hearing and determination by a single judge court of the statutory claim (MISHLER, J.) [A 30-31]. The petitioners withdrew their application for a three-judge court [A 66]. In their brief in support of the temporary restraining order, petitioners raised solely their equal protection claim in support of their constitutional argument.

On February 28, 1972, a trial was held pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Arthur J. Doring, a consultant with the State Department of Social Services [A 40] testified that he wrote the regulation at issue [A 48] after conducting a thorough study of housing conditions and the problems of eviction in Nassau County [A 40-43]. There is an acute housing shortage in Nassau County [A 52]. The regulation thus allowed a recipient who misallocated her rent money to forestall eviction by receiving an advance allowance on her rent—in keeping with the Department's recognized obligation to provide shelter [A 49]. The provision for recoupment of rent payments was added to discourage mismanagement and prevent wide-spread abuse [A 42, 48, 57]. Prior to this regulation, the State had no policy on duplicate payments and would not reimburse any locality that advanced rent allowances [A 42].

The regulation was not intended to be applied to recoupment of rent monies lost by theft [A 48, 49], nor was it intended to require advance allowances without the consent of the recipient [A 50]. If any recipient felt aggrieved by the implementation of the regulation, he or she always had the right to ask for a Fair Hearing to determine whether the regulation had been properly applied [A 47, *et seq.*].

Mr. Joseph Barry of the Nassau County Department of Welfare testified that prior to the formulation of the recoupment regulation, the County would not repay the rent of recipients who had misallocated their rent monies. Consequently, they were evicted, and the local departments were forced to house these people in motels until adequate substitute housing could be found [A 62-63].

By decision dated March 3, 1972 [A 66-71], the District Court (MISHLER, J.) found that 18 NYCRR 352.7(g)(7) violated the Social Security Act and the regulations thereunder. The Court cited 42 U.S.C. § 602(a)(7) and (10) and 45 CFR § 233.20(a)(3)(ii) (c) and (d) and implied that these sections required that the current needs of an AFDC family must be met. The District Court held that it had pendent jurisdiction over these statutory issues because petitioners' equal protection claim was substantial [A 68]. The order of the Court, dated March 14, 1972, permanently enjoined the enforcement of the regulation [A 75-76].

B. The First Second Circuit Decision

Respondent State Commissioner Wyman^{*} appealed to the United States Court of Appeals for the Second Circuit. Aside from defending the merits of the statute, he argued that the federal courts did not have jurisdiction over the action because no substantial constitutional question was presented. Petitioners responded that their equal protection claim was substantial; they additionally raised a new constitutional claim—that the alleged unavailability of notice and hearing to contest the recoupment denied them due process. They made no mention of the due process claim alleged in their complaint as to the lack of standards in the regulation.

^{*} George K. Wyman resigned as Commissioner of Social Services on March 31, 1972, and was replaced by Abe Lavine on May 1, 1972. A substitution of parties has been made in this Court.

By decision dated June 15, 1972, the Second Circuit vacated the order of the District Court and remanded the case for further proceedings [A 79-84] (462 F. 2d 928). The majority found jurisdiction under 28 U.S.C. § 1343(3) because this Court had recently "laid to rest . . . the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction." [A 81] However, the majority made no finding as to which, if any, of petitioners' constitutional claims was substantial. Rather, it determined that it could not consider petitioners' due process claim of lack of notice and hearing until petitioners actually attempted to obtain hearings ["until the question of fair hearings is resolved, it is premature to permanently enjoin implementation of § 357(g)(7)"] [A 82].⁶ Moreover, the majority declined to decide any of the issues raised until these state administrative procedures were utilized because "it is not yet clear how the state will interpret or implement its recoupment regulation" [A 82].

Judge Lumbard, in dissent, voted to reverse on the merits. He found that 18 NYCRR 352.7(g)(7) was a valid exercise of the State's power to make regulations governing the payment of welfare grants and was not in conflict with federal law [A 83-84].⁷

C. The Second District Court Proceeding

The five original named plaintiffs never complied with the mandate of the Second Circuit that they request hearings. In point of fact, the Nassau County Department of

⁶ The State had vigorously argued that state Fair Hearings were always available to petitioners. [See A 47, *et seq.*]

⁷ Given the broad discretion of the State to give a percentage of the standard of need and to set maximum limits on AFDC grants, it is clear that there is no federal requirement that the current needs of recipients be met. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970). *Cf. Ward v. Winstead*, 314 F.Supp. 1225 (N.D. Miss. 1970).

Social Services had reimbursed all of these original plaintiffs for the money that it initially recouped. Therefore, aside from their failure to comply with the Second Circuit's mandate, none of the original plaintiffs had a cause of action remaining and none could form the basis of any class attacking the regulation at issue.

In the light of this event, counsel for petitioners moved to intervene new plaintiffs who had live grievances and who had had state Fair Hearings. An intervenors' complaint, dated September 29, 1972, was thus filed in the District Court. This complaint raised similar issues as were raised previously with one exception—the due process claim as to an alleged lack of standards in the regulation, which had never been pressed since the filing of the original complaint, was now formally abandoned [see A 107-110]. By opinion and order dated October 19, 1972, the District Court again permanently enjoined the enforcement of 18 NYCRR 352.7(g)(7) [A 112-117]. It again held that the State regulation contravened 42 U.S.C. §§ 602(a)(7) and (a)(10) and 45 C.F.R. § 233.20(a). The decision relied in part on an *amicus* brief filed by the Department of Health, Education and Welfare that suggested that the regulation violated federal regulations.*

* Whatever the prior views of HEW, they are no longer the views of that department. 45 C.F.R. § 233.20(a)(3)(ii)(d) has now been repealed and § 233.20(a)(12) has been added effective October 15, 1973. This new section explicitly sanctions recoupment regardless of the reason for the additional payment. It states:

§ 233.20 Need and amount of assistance.

(a) Requirements for State plans.

* * *

(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

(i) Recoupment of overpayments of assistance, including overpayments resulting from assistance paid pending a hearing decision; Under this requirement:

(footnote continued on following page)

D. The Second Circuit Court Proceeding

Respondent Wyman then appealed to the Court of Appeals for the Second Circuit, again claiming, in addition to an argument on the merits, that the federal courts did

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(A) The State may recoup any overpayment (election by the State not to recoup overpayments shall not waive the provision of §§ 205.40, 205.41 or any other quality control requirement);

(B) Except where there is evidence which clearly establishes that a recipient willfully withheld information about his income and resources, recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered;

(C) The plan may provide for recoupment from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payments or from both; and

(D) If the recoupments are made from current assistance payments, the State shall establish reasonable limits on the proportion of such payments that may be deducted, so as not to cause undue hardship on recipients.

(E) The plan may provide for recoupment in all situations or in specified circumstances and for waiver of the overpayment where the cost of collection would exceed the amount of the overpayment.

(ii) Prompt correction of underpayments to current recipients, resulting from administrative error where the State plan provides for recoupment of overpayments. Under this requirement:

(A) Retroactive corrective payment shall be made only for the 12 months preceding the month in which the underpayment is discovered;

(B) For purposes of determining continued eligibility and amount of assistance, such retroactive corrective payments shall not be considered as income or as a resource in the month paid nor in the next following month; and

(C) No retroactive payment need be made where the administrative cost would exceed the amount of the payment.

not have jurisdiction to hear this case because the constitutional claim alleged was insubstantial. Petitioners responded by arguing that their equal protection claim was substantial. They made no mention whatever of any due process claim.

The Second Circuit reversed the decision of the District Court on the ground that no substantial constitutional claim was presented by petitioners' equal protection argument [471 F. 2d 347] [A 120-124]. The Second Circuit remanded the case to the District Court to dismiss for want of jurisdiction, since the absence of a substantial constitutional claim deprived the District Court of jurisdiction to decide the statutory claims [A 124].

E. The Petition for Certiorari

Petitioners requested certiorari from this Court by petition dated March 29, 1973, claiming that the Court below erred because their equal protection claim was substantial and because jurisdiction existed under 28 U.S.C. § 1343. They made no mention of any due process claim. This Court granted certiorari on June 11, 1973.

Summary of Argument

I

Respondents contend that the Court below correctly determined that the equal protection claim raised by petitioners was insubstantial. The Court correctly applied the standard set forth by this Court that the constitutional claim be "obviously without merit". *Goosby v. Osser*, 409 U.S. 512 (1973); *Ex parte Poresky*, 290 U.S. 30 (1933). A determination of whether a claim falls within this standard can be made by applying general equal protection principles of analysis in the field of social welfare.

A statutory classification does not offend the Equal Protection clause if any state of facts reasonably may be conceived to justify it. *Dandridge v. Williams*, 397 U.S. 471 (1970). This broad standard is especially applicable in social welfare classifications where states have broad discretion in allocating limited funds. *Jefferson v. Hackney*, 406 U.S. 575 (1972). An application of this standard to the facts of this case compels a finding of insubstantiality.

The equal protection claim raised herein is patently insubstantial. Petitioners claim that the State recoupment regulation creates two classes of needy children—those that receive duplicate payments and are subject to recoupment, and those who receive no extra payments and are not subject to recoupment. On its face, this claim is frivolous. The State can utilize its limited resources to treat all classes of recipients equally, as well as encourage proper management of welfare payments. The Social Security Act does not mandate the making of distinctions as to the needs of children in determining the amount of grants to a family. *Dandridge v. Williams, supra*. Nor does equal protection require that a specific goal of a statutory classification be met. *McGinnis v. Royster*, 410 U.S. 263 (1973). Given the especially broad discretion that States have in making statutory classifications in social welfare cases, petitioners' equal protection claim is obviously without merit. In the absence of a substantial constitutional claim, there can be no pendent jurisdiction over the statutory claim. *Rosado v. Wyman*, 397 U.S. 397 (1970).

II

The federal courts do not have jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of a claim alleging a violation of the Social Security Act. Section 1983 does not provide a remedy for the deprivation of any "rights" secured by the Social Security Act. The history of § 1983 shows that Congress

was concerned solely with constitutional rights and the statutes enforcing such rights when it passed the Civil Rights Act of 1871. See *Monroe v. Pape*, 365 U.S. 167 (1961). The language "and laws" added to § 1983 by the revisers was inserted to ensure that actions brought pursuant to the substantive sections of the Civil Rights Acts were "authorized by law" within the meaning of Section 1343. Congress never intended to create a cause of action for every conceivable federal claim without any jurisdictional limitation merely because state action might be involved.

Even if this were the intention of Congress, there is no jurisdiction to hear these claims in the federal courts irrespective of the jurisdictional amount requirement. Section 1343(3) explicitly provides for jurisdiction only for rights secured by the Constitution or by "any Act of Congress providing for equal rights of citizens." The history of § 1343(3) shows that Congress meant exactly what it said. See *Georgia v. Rachel*, 384 U.S. 780 (1966).

Petitioners' attempt to show that § 1983 itself is an Act of Congress providing for equal rights is a "bootstraps" argument. Section 1983 creates a cause of action for the deprivation of rights enumerated elsewhere. It is the "civil action authorized by law to be commenced" under § 1343; it is not the act providing for the protection of equal rights. If § 1983 is such an act, then the language "and laws" in that section must also be so limited, and § 1983 would not encompass rights arising under the Social Security Act.

Section 1343(4) likewise does not provide jurisdiction for claims arising under the Social Security Act. The legislative history of that section shows that Congress in 1957 was concerned solely with providing federal jurisdiction for cases concerning protection of voting rights. The jurisdictional addition to § 1343 as to "civil rights, including the right to vote" was the "technical amendment" that the House Report says it was. During the Congressional debates, both the House and Senate made it clear that the provisions of the

bill ultimately passed would have nothing to do with social security in any manner whatever. The amended catchline of section 1343 specifically added the term "elective franchise".

Moreover, Congress explicitly intended that there be no federal jurisdiction for social welfare suits arising under the AFDC provisions of the Social Security Act. When Congress passed that Act in 1935, it specifically provided federal jurisdiction for actions by individual recipients under the Old Age, Survivors and Disability Insurance provisions, but set up an entirely different administrative scheme for the AFDC program whereby only a state could appear before the federal agency to defend its State plans on penalty of forfeiture of federal funds. 42 U.S.C., § 604. Congress clearly intended that the administration and enforcement of the AFDC programs be with the States.

POINT I

Petitioners' claim that they were denied equal protection of law does not raise a substantial constitutional question sufficient to establish jurisdiction under 28 U.S.C. § 1343(3).

Petitioners raised one, and only one, constitutional claim in the lower courts—that they were denied the equal protection of the law because the recoupment of advances made to forestall eviction resulted in lower subsequent grants of assistance than that available to other welfare recipients [see A 123].* The Second Circuit considered this

* In an effort to find a constitutional claim for the purpose of obtaining jurisdiction, petitioners present to this Court what they call a due process claim in that the regulation at issue creates irrebuttable presumptions contrary to fact [Pet. Brief, pp. 19-20]. They express bewilderment as to why the court below *sub silentio* ruled this claim to be insubstantial [Pet. Brief, p. 20], and attack the court below as erroneously applying *Dandridge v. Williams*, *supra*, to a due process claim [Pet. Brief, p. 33]. This expression

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claim in the light of the guidelines for evaluating equal protection claims in social welfare cases and determined that the recoupment regulations had a rational basis [A 123]. In so ruling, the Court held that petitioners "clearly failed" to establish jurisdiction in the federal courts by advancing a substantial constitutional claim [A 123]. It is respectfully submitted that this holding is plainly correct and is a proper application of the stand-

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of criticism is outrageous, as they have never before raised this claim in any court.

When petitioners filed their first complaint, it contained along with the equal protection claim, a due process claim that the regulation was "without any standards regarding or requiring determination as to the circumstances resulting in non-payment" [A 14]. On their motion for a temporary restraining order in the District Court, petitioners argued solely that the equal protection claim was substantial. They never mentioned this due process claim again. The District Court thus ruled only that the equal protection claim was substantial [A 68], and, on appeal to the Second Circuit, that was the only claim argued by respondents. Petitioners, however, filed a responding brief defending their equal protection claim and raising a new due process claim to the effect that they were entitled to notice and hearings. They made no mention of any other due process claim. The Second Circuit remanded the case for petitioners to utilize the State fair hearing procedures that respondents had always emphasized were available.

By this time, the case had become moot as to all of the named plaintiffs because the local Department of Social Services had reimbursed them as to all of the monies recouped. Since this would have effectively destroyed the class action and mooted the case, *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973), three new petitioners from other counties were intervened, and a new complaint was filed. No due process claim was articulated in this second complaint. [See A 101-111.] Once again, the District Court enjoined the regulation.

On appeal to the Second Circuit, respondents again asserted the insubstantiality of the equal protection claim, which was by now the only constitutional claim in this case. Petitioners defended solely on the grounds that the equal protection claim was substantial. The Second Circuit ruled it was not [A 123]. For petitioners to thus claim that the Second Circuit decided any due process claim to be insubstantial is ludicrous—no due process claim was ever presented or was even in the case.

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ards enunciated by this Court for the determination of substantiality.

A. The Standard for Determining Substantiality

Section 1343(3) of Title 28, U.S.C., gives the federal district courts original jurisdiction of civil actions to redress deprivations under color of State law of rights secured by the Constitution of the United States. In order for the district court to obtain jurisdiction, it must examine

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In their application for certiorari to this Court, petitioners claimed solely that the equal protection claim was substantial. They made no contention of any due process claim. It is only now, in their brief on the merits in this Court, that petitioners raise for the first time a due process claim—concerning the alleged existence of irrebuttable presumptions—a claim that was never even mentioned in petitioners' half-hearted attempt to allege a due process deprivation in their mooted initial complaint.

This Court has consistently stated that where an issue is neither raised nor considered by the Court of Appeals, it will not be considered by the Supreme Court unless there are exceptional circumstances. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-63, n. 16 (1958). See also *Irvine v. California*, 347 U.S. 128, 129 (1954); Supreme Court Rule 40(1)(d)(2) [Failure to raise claim in certiorari petition precludes review]. There are clearly no exceptional circumstances here, and petitioners do not attempt to present any. This is not even a case of a failure to raise a claim on appeal that was presented in the District Court or even in the pleadings—the due process claim alleged was never raised anywhere.

The reason it was not previously raised is obvious from the claim itself. Petitioners allege that the regulation creates irrebuttable presumptions that all recipients who receive duplicate rent payments have mismanaged their grants and that these duplicate payments remain available as a resource to meet current needs during the recoupment period. There are no such presumptions at all, much less any irrebuttable ones. The regulation is not limited solely to proven cases of mismanagement or to cases where duplicate payments remain available as a resource. The regulation means exactly what it says—if you request a double rent payment, you have to pay it back over the next six months. It can hardly be said that this is too vague or standardless for a welfare official to administrate. [See Pet. Brief, p. 19, n. 12.]

the pleadings to determine whether the constitutional claim raised therein is substantial. See e.g. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The traditional test for determining substantiality, in the context of whether a three-judge court must be convened pursuant to 28 U.S.C. § 2281 or whether jurisdiction can be exercised over pendent claims, has been consistently adhered to by this Court. A question is insubstantial "either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'." *Ex parte Poresky*, *supra*, 290 U.S. at 32. See *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-106 (1933); *Hannis Distilling Co. v. Mayor and City Council of Baltimore*, 216 U.S. 285, 288 (1910).

This Court's recent decision in *Goosby v. Osser*, *supra*, did not change this test. Petitioners imply that now a claim is insubstantial only if prior decisions of this Court inescapably render the claims frivolous [Pet. Brief, pp. 22-23, 30]. However, *Goosby* arose in the context of the Circuit Court's finding a lack of jurisdiction because the claims raised were directly foreclosed by the facts of a specific case, namely *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). It is only in *that* situation, "[I]n the context of the effect of prior decisions upon the substantiality of constitutional claims," *Goosby*, 409 U.S. at 518, that this Court held that these prior decisions must inescapably render the claims frivolous.¹⁰

¹⁰ The Court also specified that this standard applies "for the purposes of 28 U.S.C. § 2281". *Goosby*, 409 U.S. at 518. If any change was intended by this Court, it would be limited to such

The test for substantiality enunciated by this Court in *Ex parte Poresky*, *supra*, and cited with approval in *Goosby*, is not limited to finding prior Supreme Court cases directly on point in both factual and legal circumstances. That is but one aspect of the test. This Court has held in *Levering & Garrigues Co. v. Morrin*, *supra*, cited with approval in *Goosby*, that the test for substantiality is two-pronged. Either the constitutional claim is "obviously without merit" or it is foreclosed by prior Supreme Court decisions directly on point. *Cf. Bailey v. Patterson*, 369 U.S. 31 (1962) [Constitutional claim held valid on its face because of prior decisions; statute enjoined without the convening of a three-judge court]. In *Levering*, this Court specifically found a claim insubstantial "by an application of the second test" (prior decisions) and passed "without inquiry, the first of these tests" (obviously without merit). 289 U.S. at 105-106.

A constitutional claim can thus be "obviously without merit" for jurisdictional purposes without having to be foreclosed by a prior Supreme Court decision directly on point one way or the other. The word "obviously" has "cogent legal significance". *Goosby*, 409 U.S. at 518, and may well require the claim to border on the frivolous. See *Baker v. Carr*, 369 U.S. 186, 199 (1962). However, this determination can be made by an application of the principles of constitutional analysis set forth in prior Supreme

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three judge court situations—where Congress wished to remove any possibility that a single judge could paralyze a state statutory scheme. See *Swift & Co. v. Wickham*, 382 U.S. 111, 116-119 (1965). Where the question of substantiality arises in the context of the power to consider a pendent claim, the considerations for determining federal jurisdiction are the opposite—whether the federal courts should be allowed to rule on claims over which they would have no jurisdiction in the first instance. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The three judge court rationale may well compel a more lenient definition of substantiality.

Court cases that need not be directly on point as to both law and facts.

Ex parte Poresky, supra, is a perfect example. There a constitutional attack was made on a Massachusetts law mandating compulsory automobile liability insurance. The district court declined to convene a three-judge court and dismissed the complaint for want of a substantial federal question. This Court upheld this finding of insubstantiality, holding that it was proper to dismiss the case "in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed." 290 U.S. at 32. It is thus clear that what precluded a finding of substantiality was not a prior case on point, but the application to the facts of the case at bar of a general principle concerning the broad discretion of a state under its police powers. Thus the plaintiff could not argue, among other claims, that he was denied equal protection because the compulsory insurance statute only applied to citizens of Massachusetts, since the State had sweeping powers to enact protective laws in the area of public safety.

This analysis applies directly to cases in the area of social welfare. This Court has consistently held that the states have a uniquely broad discretion in enacting legislation implementing their welfare programs. In the landmark case of *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court set forth the broad equal protection standard to be applied in social welfare cases. It stated [397 U.S. at 485]:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality', *Lindsley v. Natural Carbonic Gas Co.*, 229

U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be and unscientific'. *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" *McGowan v. Maryland*, 366 U.S. 420, 426.

In upholding a Maryland maximum grant regulation that was challenged, as in the instant case, on the grounds that it discriminated against a certain class of children, 397 U.S. at 476, this Court refused to consider either the wisdom of the regulation or whether better alternatives could be devised. 397 U.S. at 487. Rather, this Court emphasized that [397 U.S. at 487]:

" . . . the intractable economic, social, and ever philosophical problems presented by public welfare assistance programs *are not the business of this Court.*"
(Emphasis added)

The Court thus accepted Maryland's rationale that a maximum grant system was a rational way to allocate funds to the needs of the largest possible number of families. It added [397 U.S. at 487]:

" . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The analysis of *Dandridge* has been consistently reaffirmed. In *Jefferson v. Hackney*, 406 U.S. 535 (1972), this Court again emphasized the "broad discretion" [406 U.S. at 545] of states in the area of social welfare. It stated [406 U.S. at 546-547]:

"So long as its judgments are rational and not invidious, the legislature's efforts to tackle the prob-

lems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

Any considerations of whether the equal protection claim alleged in the instant case is substantial must thus be determined in the light of the exceptionally broad powers of states to make legislative classifications in the area of social welfare.¹¹ When the *Dandridge* standard of review is applied to the claim at bar, it is clear that it is "obviously without merit" so as to lack the substantiality necessary for federal jurisdiction.

B. Petitioners' Constitutional Claim is Insubstantial

Petitioners allege that the New York recoupment regulation creates two classes of needy children—those subject to recoupment because they received extra payments and those not subject to recoupment because they have not received extra payments. They claim that this classification is invidious because the children are classified on the basis of their parents' conduct [Pet. Brief, pp. 24-25]. However, petitioners misconceive the reality of the situation.

Petitioners have received an additional benefit over and above their statutory grant. They all are in the position of having misallocated the money given to them to pay their rent. Rather than the County Department allowing these people to be evicted, it has stepped in and paid the back rent to end the eviction proceedings. These people

¹¹ This liberal classification criterion is analogous to that granted the states in the area of taxation. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). This Court has grouped together "the area of economics and social welfare" in establishing equal protection standards. *Dandridge*, 397 U.S. at 485.

have thus received a benefit greater than any other class of recipients, who have had to pay their full rent and then strictly allocate the remaining funds to fulfill their other needs. It is thus incontestably reasonable for petitioners, who have received and actually utilized greater monies than similarly situated recipients, and greater monies than to which they were entitled, to reimburse these monies to the Department.

Petitioners' claim of disparate treatment raising to the level of unconstitutionality is thus totally meritless. As the Court below stated [A 123]:

"By receiving the advance payment, plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. *The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance.*" (Emphasis added)

Petitioners are demanding to be treated *better than* similarly situated recipients. They cannot claim a denial of equal protection because the respondents desire to treat them the same as others so situated.

This situation was recognized by the court in *Acosta v. Swank*, 312 F. Supp. 765 (N.D. Ill. 1970), which summarily rejected an equal protection argument on an Illinois statute requiring recoupment of emergency payments necessitated by prior misallocation of regular payments.¹² The Court stated [312 F. Supp. at 767]:

¹² This opinion was withdrawn [318 F. Supp. 1348 (N.D. Ill. 1970)] because the Illinois regulation as to duplicate payments was changed as a result of negotiations between HEW and Illinois officials being conducted while the Court was hearing the case. On remand, the Court stated that plaintiffs failed to state a cause of action and that jurisdiction was lacking. 225 F. Supp. 1157.

"The only difference between the treatment accorded to plaintiffs by defendants from that given to other persons similarly situated is that plaintiffs have been given *preferred treatment* over the other persons so situated who have not needed emergency allotments." (Emphasis added)

See also *Snell v. Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *affd.* 393 U.S. 323 (1969) [Requirement of repayment to the State of recipient's disability benefits did not violate equal protection]; *Morgan v. Kennedy*, 331 F. Supp. 861 (D. Neb. 1971).

It is thus difficult to see how petitioners can even begin to make an equal protection argument as to their being treated differently from other AFDC families. To argue that children are being treated differently because of their parents' conduct is to beg the question. These same children received the benefit of the extra payment that similarly situated children did not receive; they therefore can be subjected to recoupment of that additional payment.

Moreover, this Court has never recognized any breakdown between the actions of parents and children in considering the legality of the level of AFDC grants by the states. The grant is to the family, and all problems of compliance relate to the family as a unit. Thus, in *Wyman v. James*, 400 U.S. 309 (1971), this Court held that the refusal of a mother with children to allow home visitation by the agency may result in the termination of benefits to the entire family. This Court noted that the choice was entirely up to the welfare mother, 400 U.S. at 324, and stated [400 U.S. at 325]:

"The only consequence of her refusal is that payment of benefits cease. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits."

In analogous situations, the federal courts have sustained the denial of AFDC benefits to families where the parent refused to assign deeds to real property or other assets to the agency, *Snell v. Wyman*, *supra*; *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd* 405 U.S. 970 (1972), even where the Court specifically noted that "the refusal of aid to the parent means deprivation to the child." 332 F. Supp. at 1184. See also *New York State Department of Social Services v. Dublino*, — U.S. —, 41 U.S.L.W. 5047 (1973).

This analysis was most strikingly presented in *Dandridge v. Williams*, *supra*, where the plaintiffs argued that the state maximum grant regulation discriminated against children in large families. While noting that the effect of the regulation "is to reduce the per capita benefits to the children in the largest families" 397 U.S. at 477, what is really affected is the *family* grant. 397 U.S. at 477-478. This Court stated [397 U.S. at 479]:

"The very title of the program, the repeated references to families . . . and the words of the preamble quoted above, show that Congress wished to help children through the family structure."

It is thus clear that petitioners' assertion of invidious discrimination against children, as opposed to the entire family, is frivolous.¹³ In determining the level of assistance, the Courts look solely to the family grant. See also *Rosado v. Wyman*, 397 U.S. 397 (1970).

¹³ Petitioners' citation of *Levy v. Louisiana*, 391 U.S. 68 (1968), is inapposite. It has nothing to do with the entitlement to benefits of a family as a unit. The language quoted from that case by petitioners [Pet. Brief, p. 28] is a misquote. The Court actually stated that it is invidious to discriminate against children when their actions are not relevant to the harm suffered by the *mother*, not the children themselves. The actions of the mother certainly control the ultimate welfare of the children.

The issue thus presented in *Dandridge*, as in the instant case, was that given the state's finite resources, its choice was either to support some families adequately and others less adequately, or not to give sufficient support to any family. 397 U.S. at 479. This Court held that the state can sustain as many families as it can. In the case at bar, it is clear that New York cannot penalize recipients who properly manage their grants by expending double payments to those who do not. Given New York's finite resources, the result may well be a ratable reduction in everyone's grant [see A 123], or the alternative of having recipients evicted and thrown out on the street. The problem of recoupment of duplicate rent allowances is plainly one of the intractable problems of the welfare system that cannot be dealt with by putting the states in a constitutional straitjacket. *Jefferson v. Hackney*, *supra*, 406 U.S. at 546. It is obviously reasonable for New York to allocate its limited resources so that each family receives an equal share.

Petitioners further attack the rationality of New York's recoupment regulation by claiming that it both violates the goal of the Social Security Act, and is destructive of overriding state objectives because it does not place foremost the needs of the child [Pet. Brief, pp. 26-28]. In particular, they focus on the reasoning of the Court below that, in addition to the regulation being "reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature" [A 123], the regulation also encourages proper money management.¹⁴ Petitioners attack this as misconceiving the issue "by fastening upon but one element in a complex system of

¹⁴ As the Court below correctly pointed out, if there were not a recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month [A 123]. See 42 U.S.C. § 602(a)(14).

public welfare" [Pet. Brief, p. 27]. Yet, to make this argument is to answer it—for *Jefferson v. Hackney*, *supra*, reiterates the established principle in analyzing equal protection claims that [406 U.S. at 546]:

"A legislature may address a problem 'one step at a time', or even 'select one phase of one field and apply a remedy there, neglecting the others' . . ."

The rational basis test of *Dandridge* means that the regulation must have some rational relationship to a legitimate state objective. Cf. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973).¹⁵ There are obviously many legitimate state objectives and some that ultimately may conflict with each other. Certainly the State has an interest in meeting the needs of children, but it also has a legitimate interest in allocating its limited resources so that all recipients are treated equally and so that mismanagement is discouraged. The teaching of *Dandridge* is that the State will not be compelled to pick and choose among these objectives.¹⁶

This was made clear in the recent case of *McGinnis v. Royster*, 410 U.S. 263 (1973), where this Court upheld a New York statutory distinction in the awarding of good behavior time in state prisons even though the rationale supporting the legislative classification was not supportive of the primary aim of the statute. This Court stated [410

¹⁵ Petitioners' expectation that a more modified equal protection test may apply [Pet. Brief, p. 32] has been put to rest by the *San Antonio School District* decision.

¹⁶ As petitioners have pointed out [Pet. Brief, p. 30], the New York courts have been responsive to true emergency situations by supplying a supplementary remedy where necessary. See also *Matter of Howard v. Wyman*, 28 N.Y. 2d 434, 322 N.Y.S. 2d 683, 686, fn. 3 (1971).

U.S. at 276]:

"... our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience,' *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966), or if some legitimate state interest is advanced, *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying."

This language applies directly to the case at bar. Given the complexities of public welfare that even petitioners recognize, the State must have the broadest discretion to choose among its goals, and the courts will not decide whether these goals are wise or whether they best fulfill the social and economic objectives that New York might ideally espouse. *Dandridge*, 397 U.S. at 487. See also *San Antonio School District v. Rodriguez, supra*, 411 U.S. at 42, 50-51.

It is thus clear that, upon application of the equal protection standard of *Dandridge*, petitioners' claim is frivolous. If a classification has any rational basis that supports any legitimate state interest, it must be sustained. In the area of social welfare, the States have especially broad discretion in making statutory distinctions, and these distinctions can be legitimately made in the AFDC program on the basis of the family grant itself. Given these principles, it requires little judicial effort to find the equal protection claim "obviously without merit", for on the face of the statute, even aside from any goals of deterring mismanagement, the rent recoupment regulation is designed to treat all welfare recipients equally by recouping monies from certain recipients who actually received

payments to which they were not entitled in the first place.¹⁷

Petitioners claim that this disposition below was actually on the merits rather than being a determination of threshold jurisdiction. However, it is plain that some discussion of the merits is necessary to find a claim obviously without any merit. A determination of threshold jurisdiction may preclude the introduction of evidence, *cf. Carter v. Stanton*, 405 U.S. 669 (1972), but it certainly cannot foreclose argument. Indeed, a finding of lack of substantiality must of necessity be a finding on the merits—that there is no merit whatever. In considering the broad standards applicable to equal protection claims, especially in the area of social welfare, the federal courts have often made such findings of jurisdictional insufficiency.

Thus, in *Money v. Swank*, 432 F. 2d 1140 (7th Cir. 1970), the Seventh Circuit considered an equal protection chal-

¹⁷ Petitioners attempt to show that their equal protection argument is substantial by indicating that three-judge courts have been convened in other Circuits in considering similar statutes. However, the constitutional arguments made in those cases were not the same as that made in the instant case. In *Acosta v. Swank*, *supra*, the plaintiff challenged the state's not requiring recoupment to recipients receiving emergency assistance within 90 days of the initial grant, but requiring such recoupment thereafter; in *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970), the plaintiff, in addition to due process and equal protection claims, raised a Fifth Amendment claim of self-incrimination because of the possibility of criminal penalties resulting from an admission to having endorsed over a welfare check; in *Holloway v. Parkham*, 340 F. Supp. 336 (N.D. Ga. 1972), the plaintiff raised due process claims in addition to the equal protection claim; in *Bradford v. Juras*, 331 F. Supp. 167 (D. Ore. 1971), the reported opinion does not indicate the constitutional claims raised.

Not one of these cases considered this Court's opinion in *Dandridge v. Williams*, *supra*, and all were decided before *Jefferson v. Hackney*, *supra*. Indeed, only one of these cases ever reached the merits of the constitutional claim similar to the one at issue, and that court summarily rejected that equal protection claim as frivolous. *Acosta v. Swank*, *supra*.

lenge to an Illinois regulation making distinctions in educational allowances between academic and vocational programs for welfare recipients. The court looked to the standards of *Dandridge*—that the states have great latitude in dispensing available funds and that any reasonable legislative objective can support the classification regardless of the wisdom of the choice. 432 F. 2d at 1143. The Court then found that no substantial constitutional question was presented, citing the need for vocational education and the limited state funds available, and refused to convene a three-judge court. Similarly, in *Aguayo v. Richardson*, 473 F. 2d 1090 (2d Cir. 1973), the Second Circuit held that the application of the *Dandridge* "standard of review" precluded a finding of jurisdictional substantiality as to the equal protection claim made therein that a welfare work program only applied in a limited number of districts. 473 F. 2d at 1109. See also *Waier v. Schmidt*, 318 F. Supp. 22 (E.D. Wis. 1970).

Equal protection claims in non-welfare areas have also been treated by the federal courts' applying the broad rational basis standard in dismissing for want of a substantial federal question. See *Lindauer v. Oklahoma City Urban Renewal Authority*, 452 F. 2d 117 (10th Cir. 1971), cert. den. 405 U.S. 1017, reh. den. 406 U.S. 911 (1972); *Smith v. Follette*, 445 F. 2d 955, 959 (2d Cir. 1971); *White v. Gates*, 253 F. 2d 868 (D.C. Cir. 1958), cert. den. 356 U.S. 973 (1958); *Hanley v. Volpe*, 305 F. Supp. 977, 981-982 (E.D. Wis. 1969); *American Commuters Association v. Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd 405 F. 2d 1148 (2d Cir. 1969).

All of these cases involved decisions on the "merits" to the extent that the merits had to be discussed before a finding of jurisdictional insubstantiality was made. However, the federal court in each of these cases implicitly based its finding of insubstantiality on the difficulty of alleging arguable equal protection claims in the light of the broad

discretion given the states to make classifications that can withstand equal protection scrutiny. When petitioners in the instant case come into federal court and claim that they are denied equal protection because they are not allowed to keep double payments to which they are not entitled and which no other recipients have received, it is easy to see how their claim cannot reach the jurisdictional level.

Since there was no substantial constitutional claim, there is no basis for jurisdiction under 28 U.S.C. § 1343(3). The Court of Appeals thus correctly determined that it had no pendent jurisdiction over the statutory claims raised. See *Rosado v. Wyman*, *supra*, 397 U.S. at 403 (1970); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

POINT II

Absent a substantial constitutional question, the federal courts do not have jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of a claim alleging a violation of the Social Security Act.

Petitioners claim that even if the federal courts did not have jurisdiction of the statutory claims as pendent to a substantial constitutional claim, there is federal jurisdiction based upon the statutory claims themselves. They assert that a claim based upon the AFDC welfare provisions of the Social Security Act, which confer no federal jurisdiction by the terms of the Act, can still be heard pursuant to 42 U.S.C. § 1983 because § 1983 is an Act of Congress providing for equal rights or civil rights under sections 1343(3) and (4) of Title 28, and because claims brought under the Social Security Act are rights secured by § 1983. It is respectfully submitted that this argument has no basis in the history of these provisions, the intent of Congress, or the decisions of the courts.

A. Section 1983 Does Not Provide a Remedy for the Deprivation of Any "Rights" Secured by the Social Security Act.

In order for petitioners to allege a claim under § 1983, they must first establish that their claim of the alleged statutory non-conformity of the State regulation with the Social Security Act is one of the "rights, privileges or immunities secured by the Constitution and laws" under § 1983. To do this, they must show that the language "and laws" includes particular provisions of the Social Security Act. The history of § 1983 belies any such interpretation.

The original source of § 1983 is section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Act of April 20, 1871 [17 Stat 13]. It stated:

"That any person who, under color of any law . . . of any State, shall subject . . . any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 1 then went on to provide jurisdiction for these proceedings as follows:

". . . such proceeding to be prosecuted in the several district and circuit courts of the United States . . . under the provisions of [the Civil Rights Act of 1866]."¹⁸

¹⁸ The Civil Rights Act of 1866 [14 Stat 27] was the predecessor of 42 U.S.C. §§ 1981 and 1982—mandating that the legal and property rights of all citizens must be the same as those granted to white citizens [14 Stat 27, § 1]. Section 2 of said act provided criminal penalties for depriving any person of rights protected by the Act. Section 3 provided jurisdiction as follows:

"That the district courts of the United States . . . shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured by the first section of this act. . . ."

The Act became positive law in 1874 [Revision of Statutes Act of 1874, ch. 333, § 2, 18 Stat 113 (1875)] as part of the Revised Statutes [Rev. Stat. § 563(12), 629(16), 1979 (1875)] and is now codified in two separate sections—42 U.S.C. § 1983 (creating the cause of action) and 28 U.S.C. § 1343 (providing the jurisdiction).

The basic problem presented by § 1983 is that its language as codified in Rev. Stat. 1979 is different from that set forth in section 1 of 17 Stat 13. The original act created a cause of action for the deprivation of rights "secured by the Constitution of the United States"; R.S. 1979 created a cause of action for the deprivation of rights "secured by the Constitution and laws." While the Revised Statutes are positive law that supersede previous Statutes at Large, there is no explanation as to the scope of the phrase "and laws" or as to even why it suddenly appeared.¹⁹ Congress did not appear to be troubled by this addition, and appears to have accepted the new language merely as a consolidation of the former statutes. See 2 Cong. Rec. 825-28 (1874).

It would seem that this language was deemed necessary to assure the existence of a federal remedy for the deprivation of rights secured by the Civil Rights Acts of 1866 and 1870 [14 Stat 27 (1866); 16 Stat 140 (1870)]. The Civil Rights Acts of 1866, 1870 and 1871 all originally contained their own jurisdictional provisions. When these statutes were revised and codified in 1875, the jurisdictional provisions were separated out. Sections 1971, 1981 and 1982

¹⁹ The Revised Statutes were drafted by a three-man Commission appointed by Congress in 1866 "to revise, simplify, arrange, and consolidate all statutes of the United States." Revision of Statutes Act of 1866, ch. 140, § 1, 14 Stat 74 (1866). They were instructed to make only those changes essential to the reorganization of the Statutes at Large and consistent with the purpose of the original law. *Id.*, 14 Stat 75 ["making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original texts"].

of Title 42 are the modern counterparts of the substantive sections, while section 1343 of Title 28 is the counterpart of the jurisdictional section. Section 1343 provides jurisdiction only for those actions "authorized by law". Therefore, by including the words "and laws" in section 1983, the revisers were assuring that actions brought pursuant to the substantive sections of the Civil Rights Acts of 1866 and 1870 were "authorized by law" within the meaning of section 1343 so as to be heard in the federal courts. See Note, "Federal Jurisdiction Over Challenges to State Welfare Programs", 72 Columbia Law Review 1404, 1418 (1972).

This analysis becomes clear when the purpose of the Civil Rights Act of 1871 is considered. The legislative history of this Act is set forth in detail in *Monroe v. Pape*, 365 U.S. 167 (1961). There can be no doubt that the expressed purpose of the Act was to exercise the power vested in Congress by section 5 of the Fourteenth Amendment to enforce that Amendment. 365 U.S. at 171. See also *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972). The legislative history further reveals that while the debates were geared to the problems created by the activities of the Ku Klux Klan, there was still concern about other civil rights, including property rights, that were protected by the Fourteenth Amendment. See *Lynch v. Household Finance Corp. supra*. However, there is no indication whatever that Congress intended that the entire panoply of federal laws in every conceivable area could be enforced through section 1983, in the absence of any constitutional claim, simply because some state action may be involved. See Cong. Globe, 42d Cong., 1st Sess. (1871). See also *Monroe v. Pape, supra*, 365 U.S. at 173-180.

This Court has recently spoken of section 1983 specifically in terms of the protection of constitutional rights. Thus in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), this Court referred to the "very purpose" of § 1983 being "to protect the people from unconstitutional actions under

color of state law". See also *Moor v. County of Alameda*, 411 U.S. 693, 699 (1973). In *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970), the Court noted that to allege a cause of action under § 1983 required proof that a defendant deprived him of a right secured by the "Constitution and laws" and that the plaintiff must show that the defendant deprived him of "*this constitutional right*" (emphasis added). While the Court in these cases mentioned that rights secured by federal law were included under § 1983, there is no indication that these "laws" were anything other than laws enforcing the Thirteenth, Fourteenth or Fifteenth Amendments.²⁰ See *United States v. Price*, 383 U.S. 787, 797 (1966) [holding that the criminal analog to § 1983 secured all constitutional rights so as to include all rights secured by the Fourteenth Amendment]. Cf. *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) [dicta]. See *Monroe v. Pape*, *supra*, 365 U.S. at 212-213 (opinion of FRANKFURTER, J.); *Adickes v. Kress & Co.*, *supra*, 398 U.S. at 203-204 (opinion of BRENNAN, J.).

Indeed, the only time this Court squarely faced the issue of whether section 1983 applied to statutory rights other than those secured by the Fourteenth Amendment, it held that it did not. *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900) [suit claiming the deprivation of a right secured by the patent laws of the United States—holding that the predecessor of 1983 referred to civil rights only]. None of the few lower court cases that have applied § 1983 to non-civil rights statutory claims ever considered the background of this statute, as each applied § 1983 without any explanation. Cf. *Bomar v. Keyes*, 162 F. 2d 136 (2d

²⁰ Petitioners suggest that the "privileges and immunities" clause of the Fourteenth Amendment should be resurrected as incorporating all federal laws within the protection of that Amendment. This Court rejected such an interpretation long ago, see *The Slaughterhouse Cases*, 16 Wall. 36 (1872), and has adhered to that position. See *Hague v. Congress of Industrial Organizations*, 307 U.S. 496, 519-521 (1939) [Opinion of STONE, J.].

Cir. 1947), *cert. den.* 332 U.S. 825 (1947); *Gomez v. Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The one federal court that has considered § 1983 in the light of its legislative history has ruled that § 1983 does not encompass claims arising under the Social Security Act. *Wynn v. Indiana State Department of Public Welfare*, 316 F. Supp. 324 (N.D. Ind. 1970). This Court has in the past declined to decide whether the federal courts have jurisdiction of suits brought under § 1983 alleging violations of the Social Security Act. *King v. Smith*, 392 U.S. 309, 312, n. 3 (1968); *Rosado v. Wyman*, *supra*, 397 U.S. at 405, n. 7.¹¹

In the light of the legislative history of § 1983, it is clear that it cannot be interpreted as petitioners claim it should be. Congress in 1871 obviously never contemplated the intricacies of a federally-funded and state-enforced social welfare system. This Court has previously looked to the lack of any expression of congressional intent under the 1871 Act in holding that it is not as broad as its language can be read. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court was faced with a suit under the predecessor of § 1983 against a member of a state legislature. The defense raised was the common law defense of legislative privilege. This Court assumed that Congress may have had the power to limit legislative freedom, but refused to rule that the broad language of the predecessor of § 1983 could apply. The Court stated [341 U.S. at 376]:

"But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute . . . were not

¹¹ In all of the cases where this Court considered statutory claims under the Social Security Act, federal jurisdiction was obtained pendent to substantial constitutional claims. *Rosado v. Wyman*, *supra*; *King v. Smith*, *supra*. There was thus no need for this Court to determine whether statutory claims were properly alleged as arising under § 1983.

spelled out in debate. We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”

See also *Pierson v. Ray*, 386 U.S. 547 (1967). Similarly, it cannot be assumed that Congress in 1871 covertly included in the general language of § 1983 suits brought under an Act that provides for the distribution of federal funds to state-run welfare programs—an area whose complexities were never even remotely envisioned a century ago.²²

B. Section 1343(3) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleging Violations of the Social Security Act.

Assuming *arguendo* that Congress created a cause of action under § 1983 for allegations of violations of the Social Security Act, it is clear that Congress did not intend that the federal courts have jurisdiction to hear these cases in every instance regardless of the jurisdictional amount involved. *Cf.* 28 U.S.C. § 1331. In keeping with the concern of Congress to protect the rights of all citizens under the Thirteenth, Fourteenth and Fifteenth Amendments, the language of 28 U.S.C. § 1343(3) could not be more specific

²² It is doubtful that the Social Security Act “secures” any rights to petitioners to initially come under § 1983 even if “laws” were given a broader interpretation. Certainly, petitioners have no right to any benefits at all, as the states are not obligated to participate in the AFDC program. *King v. Smith, supra*, 392 U.S. at 316. The entire AFDC program is formulated in terms of compliance by the individual State—administrative hearings allow only the States to be parties, and the sole remedy provided by statute is a cut-off of federal funds to the State. 42 U.S.C. § 604. Rights are “secured” to individual recipients only to the extent that the States decide to comply with the program. The AFDC program does not secure rights to the recipients themselves. See *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947).

—the District Courts have jurisdiction of actions to redress the deprivation under color of state law of any right “secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .” (emphasis added). Neither the Social Security Act nor § 1983 is such an act.

As noted, *supra*, page 29, the jurisdictional provision of the Civil Rights Act of 1871 referred to the Civil Rights Act of 1866 [14 Stat 27], which granted concurrent jurisdiction to the district courts and the circuit courts to consider the specific equal rights provisions of that Act that enforced the Thirteenth Amendment. See *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 412 (1968). The 1871 Act enforced the Fourteenth Amendment. Therefore, when the three-man revision commission compiled the Revised Statutes in 1874, it separated the jurisdictional provisions from the other provisions of these Acts and set forth the jurisdiction of all these Acts together in one set of statutes. The district court statute provided jurisdiction to redress deprivation of “any right secured by any law of the United States” [Rev. Stat. § 563(12)], while the circuit court statute provided jurisdiction to redress deprivation of “any right secured by any law providing for the equal rights of citizens” [Rev. Stat. § 629(16)]. See *Lynch v. Household Finance Corp.*, *supra*, 405 U.S. at 543-44, n. 7.

There is no explanation in the Revised Statutes as to why this distinction was made. Petitioners point to the margin notes to both sections and to the cross references to both §§ 1977 and 1979 of the Revised Statutes [now 42 U.S.C. §§ 1981 and 1983] and argue that the revisers intended that both § 629(12) and § 563(12) have the same breadth [Pet. Brief, p. 51]. If that is correct, then it seems clear that both statutes were intended to be limited to the specific language of the circuit court provision.

The language of the circuit court provision was no accident, and its formulation sheds much light on the actual

intent of Congress in providing jurisdiction under the Civil Rights Act. See in general, Note, Columbia L. Rev., *supra* at pp. 1422-23. The circuit court provision in a preliminary draft was accompanied by a lengthy draftsman's note which was concerned primarily with the construction of section 3 of the Civil Rights Act of 1866—the section that provided the jurisdiction for the 1871 Civil Rights Act. See p. 29, *supra*. Section 3, on its face, could possibly be interpreted as granting to the federal courts jurisdiction over *all* causes of action brought by persons who have been deprived of the enumerated civil rights of section 1 of that Act, regardless of whether the cause of action had any relation to the deprivation of the civil right enumerated. The draftsman observed [1 Revision of U.S. Stat. Title 13 (1872 draft) at 63]:

“it can hardly be supposed that Congress designed, not only to open the doors of the circuit courts to these parties without reference to the ordinary conditions of citizenship and amount in dispute, but, in their behalf, to convert the district courts into courts of general common law and equity jurisdiction.”

In order to avoid these “consequences which Congress cannot be supposed to have intended” [*Id.*, p. 63], the draftsmen concluded that section 3 must be construed as providing a remedy only for actions directly arising out of the deprivation of rights protected by the 1866 and 1870 Civil Rights Acts. Note, Columbia L. Rev., *supra*, at p. 1422.

The draftsman additionally noted that the Civil Rights Act of 1871 was framed to express this intention more definitely [*Id.*, p. 64]—because it creates a cause of action for the deprivation of rights “secured by the Constitution of the United States”. Therefore, the “equal rights” language was added for the following reason [*Id.*, p. 64]:

“It may have been the intention of Congress to provide, by [the 1871 Act] for all the cases of deprivations mentioned in the previous act of 1870, and thus

actually to supersede the indefinite provisions contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil rights act."

It is thus clear that section 629(16) of the Revised Statutes conferred jurisdiction on the circuit courts solely over actions to redress the deprivation of rights secured by the Civil Rights Acts passed pursuant to the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments. Note, *Columbia L. Rev.*, *supra*, at p. 1422.

In the light of this history of the circuit court provision, it does not appear that the district court provision, referring to "any right received by any law of the United States" [Rev. Stat 563(12)], can be taken literally—especially if the jurisdiction of the two courts was to be concurrent. There is no explanation for this district court language and it may just be careless drafting. See Note, *Columbia L. Rev.*, *supra*, at p. 1423, n. 147.

This becomes clearer in 1911, when the two jurisdictional provisions were merged into what is now section 1343(3) [36 Stat 1092]. Congress specifically chose the equal rights language of the circuit court provision. Indeed, the Senate Report accompanying the Judiciary Act of 1911 referred to the vesting of jurisdiction in the district court as a merging of the former circuit court and district court provisions. S. Rep. No. 388, pt. 1, 61st Cong., 2d Sess. 15 (1910). This implies that the scope of the former district court provision was, despite its broad language, originally intended to apply solely to jurisdiction over equal rights cases. Indeed, the explicit choice of the equal rights limitation in 1911 shows that Congress believed that the "and laws" addition to section 1983 was also limited to equal

rights laws"²¹ [see Point II A, *supra*]. Certainly Congress had knowledge of the most recent definitive Supreme Court decision of that day that had explicitly so limited the scope of the Civil Rights Act. *Holt v. Indiana Manufacturing Co.*, *supra*. See also Note, Columbia L. Rev., *supra*, at p. 1423, n. 152.²²

This Court's decision in *Georgia v. Rachel*, 384 U.S. 780 (1966) is especially significant. There the question concerned the scope of the federal removal statute, 28 U.S.C. § 1443, which referred to "any law providing for equal rights". This Court stated [384 U.S. at 792]:

" 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.' " (Emphasis added)

See *New York v. Galamison*, 342 F. 2d 255, 269, 271 (2d Cir. 1965), *cert. den.* 380 U.S. 977 (1965). Cf. *Greenwood v. Peacock*, *supra*, 384 U.S. at 825. It would be incredible to believe that Congress intended this language in its 1874 removal statute based on the Civil Rights Act of 1866 to have a different meaning from the identical language in

²¹ Petitioners argue from both sides of the fence to suit their purposes. When they consider the revisers' addition of "and laws" to the 1871 Civil Rights Act during the 1874 codification, they attach momentous significance to a change that they claim has no legislative history to explain it. However, when they consider a similarly unexplained addition of "equal rights" in the codification of laws in 1911, they allege that it has no significance at all.

²² The only alternative explanation, of course, would be that Congress consciously chose to narrow the jurisdiction of the district courts to equal rights claims. See Note, "The Proper Scope of the Civil Rights Acts", 66 Harvard Law Review, 1285, 1293 (1953).

the predecessor of section 1343(3) [Rev. Stat. § 629(16)] at the time this latter section was enacted into positive law the same year. *Cf. McGuire v. Amrein*, 101 F. Supp. 414, 419 (D. Md. 1951) [holding section 1343 to be intended to secure civil rights granted by the Thirteenth, Fourteenth and Fifteenth Amendments].

Petitioners attempt to distinguish *Georgia v. Rachel* by noting that the removal statute was an outgrowth of the Thirteenth Amendment and that the Civil Rights Act of 1871 was an outgrowth of the Fourteenth Amendment, which reaches deprivations beyond those cast in racial terms [Pet. Brief, p. 55]. However, this argument only adds more support to respondents' interpretation of section 1343(3). Congress specifically gave the federal courts jurisdiction of rights "secured by the Constitution"—so as to encompass all Fourteenth Amendment rights. However, Congress very strictly limited the jurisdiction of the federal courts as to statutory rights, as opposed to constitutional rights, to "any Act of Congress providing for equal rights".

The only case that has brought non-civil rights act cases within section 1343(3) is *Bomar v. Keyes*, *supra*, where the Second Circuit found a cause of action under section 1983 by an allegation of improper dismissal of a teacher because of jury duty. However, the Court never mentioned section 1343 and seems to have proceeded with the erroneous assumption that section 1983 itself conferred jurisdiction. *Cf. Lynch v. Household Finance Corp.*, *supra*; *Mattingly v. Elias*, 325 F. Supp. 1374, 1383 (E.D. Pa. 1971). This decision has not been followed in the Second Circuit, which has now ruled that jurisdiction under section 1343(3) requires a deprivation of rights secured by a law providing for equal rights, and that the Social Security Act is clearly not such a law. *Almenares v. Wyman*, 453 F. 2d 1075, 1082, fn. 9 (2d Cir. 1971), *cert. den.* 405 U.S. 944 (1972); *McCall v. Shapiro*, 416 F. 2d 246

(2d Cir. 1969). Accord: *Serritella v. Engelman*, 339 F. Supp. 738, 746, fn. 19 (D. N.J. 1972), *aff'd* 462 F. 2d 601 (3rd Cir. 1972); *Acosta v. Swank*, 325 F. Supp. 1157, 1161 (N.D. Ill. 1971); *Mattingly v. Elias*, *supra*, 325 F. Supp. at 1383.

Faced with this unimpeachable historical evidence, petitioners have shifted their entire argument in their brief on the merits in this Court. Evidently conceding the invalidity of their original argument—made in the Second Circuit and in their petition for certiorari—that the Social Security Act was an Act of Congress providing for equal rights, they now claim that section 1983 itself is such an act. This is just a “bootstraps” argument that has no basis in reality.

Section 1983 creates a cause of action. It provides that when a person is deprived of rights protected and enumerated *elsewhere*, such as the Constitution and Acts of Congress enforcing these constitutional rights, he can sue in federal court. Section 1983 is a procedural statute, not a substantive statute. In terms of § 1343, § 1983 is the “civil action authorized by law to be commenced”; it is not the act providing for the protection of equal rights.

What petitioners have done is constructed a purely verbal argument that has no basis in the legislative history of section 1983 or section 1343. As has been shown, the intention of Congress in passing these statutes was to redress rights secured by the Thirteenth, Fourteenth and Fifteenth Amendments, not to open up the federal courts to every possible cause of action merely because it arises under color of state law. The limiting language of section 1343(3) has cogent legal significance. Indeed, if Congress had intended that section 1983 be an “Act of Congress providing for equal rights”, then it would mean that the addition of the language “and laws” in section 1983 must also be limited to laws protecting equal rights—otherwise section 1983 would be too broad a statute as to come

under the limits of section 1343(3).²² If this is so, then section 1983 would not encompass the Social Security Act, and petitioners would be out of court on that ground alone [see Point II A, *supra*].

Petitioners argue that section 1983 was passed to provide a federal remedy for those unable to obtain relief from the state courts [Pet. Brief, p. 55]. Yet, this would be the very reason that Congress would provide a gap between the cause of action of § 1983 and federal jurisdiction under § 1343(3) [presupposing that there is such a gap only if "and laws" is given a broad interpretation]. In *Monroe v. Pape*, *supra*, this Court listed three objectives underlying the 1871 Civil Rights Act: (1) to override state laws discriminating against blacks; (2) to provide a federal remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, though available in theory, was not available in practice. 365 U.S. at 173-174. The purpose of the Civil Rights Act jurisdiction would be to provide a federal forum for the adjudication of those federal statutory rights that might evoke discriminatory treatment on the part of the state courts. It would thus be highly significant that Congress, in providing a forum for constitutional claims, would then limit the jurisdiction of the federal courts as to statutory claims to equal rights cases.²³

²² One of the primary principals of statutory construction is that the language of a specific statute controls over the language of a general statute. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). On this principle alone, the language of section 1343(3) would prevail over the language of section 1983.

²³ Section 1983 on its face does not specify the forum in which the action could be brought, and there is nothing to prevent 1983 claims from being brought in courts of general jurisdiction in the state courts. See *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 228 (D. Hawaii 1956), *reversed on other grounds*, 256 F. 2d 728 (9th Cir. 1958). In this regard, it must be noted that the New York state courts have consistently considered and determined the very federal conformity problems raised by the instant case. See *Matter of Griffith v. Wyman*, 39 A D 2d 874, 333 N.Y.S. 2d 703 (1st Dept. 1972).

It is thus clear that there is nothing in the history of section 1343(3) to provide jurisdiction for an action brought pursuant to the Social Security Act. There is no reason to believe that Congress intended to create special federal jurisdiction pursuant to a statute that, far from creating specially protected rights, merely sets forth procedures for the distribution of federal funds that the states are not even legally obligated to accept for distribution. *King v. Smith, supra*. Petitioners have not cited a single case that holds that section 1343(3) creates federal court jurisdiction of a claim arising under the Social Security Act.

C. Section 1343(4) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleging Violations of the Social Security Act.

Unable to obtain jurisdiction under the narrow jurisdictional provisions of section 1343(3), petitioners seize as their major argument the language referring to "civil rights" of section 1343(4) and claim that it provides a federal forum for all cases arising under the Social Security Act. They cite much language as to the "broad and sweeping" protection of "civil rights" created by the Civil Rights Act of 1866, see *Lynch v. Household Finance Corp., supra*, 405 U.S. at 543-44, and quote many sources dealing with the purpose of the 1871 Act to protect constitutional rights [Pet. Brief, p. 39]. They then interpolate this language as applying to all "civil rights" and conclude that the right to receive AFDC grants is such a "civil right" [Pet. Brief, p. 39].²⁷ Finally, petitioners conclude that sec-

²⁷ No court has ever held that the system for distribution of federal welfare funds to the states under the Social Security Act creates "civil rights". The courts have referred to rights protected by the Constitution as civil rights. See *Monroe v. Pape, supra*; *Baker v. Carr, supra*, 369 U.S. at 200, n. 19; *Lynch v. Household Finance Corp., supra*. Under the interpretation offered by petitioners, the jurisdictional limitation set forth by 28 U.S.C. § 1331 would become meaningless, for any federal "right" that can be asserted in a cause of action would become a "civil right" and thus cognizable in federal court without any monetary limit.

tion 1983 itself is an "Act of Congress providing for the protection of civil rights, including the right to vote" and that therefore any claim arising pursuant to section 1983, including any welfare claim, can be brought under section 1343(4).

This argument has a certain linguistic appeal, but it runs into one major problem—Congress never intended section 1343(4) to mean anything of the sort. Indeed, when one examines the legislative history behind the enactment of this provision in 1957, which is one of the first times Congress debated the scope of the Civil Rights Acts since the Reconstruction Era, it becomes clear that petitioners' claim of 1343(4) jurisdiction in the instant case borders on the ludicrous.

Section 1343(4) first appeared in the proposed bill before the House that was to become known as the Civil Rights Act of 1957.²⁸ The primary thrust of this bill was to protect voting rights of blacks in the South. The bill as reported out of the House Judiciary Committee had four parts. Part I established a Commission on Civil Rights whose duties were to investigate allegations concerning deprivations of the right to vote and to collect information as to factual and legal developments regarding denials of equal protection; Part II provided for an additional Assistant Attorney General who would become the head of a newly-formed Civil Rights Division in the Justice Department; Part III provided that the Attorney General would be empowered to institute a civil action under section 1985, the civil rights conspiracy section concerning the right to vote and other areas; Part IV provided similar powers to the Attorney General, specifically to enforce the right to vote under section 1971. See U.S. Code Cong. & Adm. News, H. Rept. 291, 85th Cong., 1st Sess. 1966 (1957). The language which is now § 1343(4) appeared in Part III.

²⁸ H.R. 6127 was enacted as the Civil Rights Act of 1957, 71 Stat. 634, P.L. 85-315.

In the General Statement setting forth the purpose of the bill, the House Report made it clear that the scope of the bill was limited to the civil implementation of the Thirteenth, Fourteenth and Fifteenth Amendments. The Report states [U.S. Code Cong. & Adm. News at 1970]:

"The proposal does not extend nor increase the area of civil rights jurisdiction in which the Federal Government is entitled to act. Those rights are presently protected by constitutional amendment and when violations occur they are subject to Federal prosecution. The provisions of the legislation, in fact, merely substitute civil proceedings for criminal proceedings in the already established field."

In discussing Part III of the bill, the implementation of section 1985 containing the present language of 1343(4), the report made clear that it did not expand rights presently protected [*Id.*, at p. 1976]:

"Section 122 amends section 1343 of Title 28, United States Code.

These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill. The first part of the proposal amends the catch line of a section, and the other section adds a new paragraph setting forth the jurisdiction of the courts. (Emphasis added)

It is difficult to conceive how "technical amendments" specifically designed to give limited powers to the Attorney General under 42 U.S.C. § 1985 in the area of voting rights suddenly can be made to create jurisdiction under section 1983 for rights secured by every federal statute in existence. This Court has held, contrary to petitioners' assertion [Pet. Brief, p. 42], that great weight is to be given to the interpretations of bills as set forth in the committee reports. *Duplex Printing Press Co. v. Deering*, 254 U.S.

443, 474-75 (1921); *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U.S. 310, 318 (1918). Petitioners, however, claim that Congress did not mean what it explicitly said, and attempt to show through a rather tortured linguistic analysis that Congress was greatly expanding the jurisdiction of the federal courts to hear every conceivable federal claim. Nothing could be further from the truth.

When the bill was initially introduced into the House for debate, it was explained to the House in great detail by Representatives Kenneth Keating and Peter Rodino [103 Cong. Rec. 8496-8498; 8498-8500]. Neither even mentioned the jurisdictional provision of 1343. It thus certainly cannot have been considered to be as revolutionary as petitioners claim it to be. This was made abundantly clear during the course of the debate in an exchange involving an amendment proposed by Representative Bruce Alger of Texas.

Representative Alger requested that, in detailing the powers of the Commission on Civil Rights, a reference should be made to the Commission studying facts pertaining to the "right to work" [103 Cong. Rec. at 9038]. The Judiciary Committee Chairman, Emanuel Celler of New York, replied that this was not germane to the bill. He stated [103 Cong. Rec. at 9038]:

"There has been a vacuum created in southern States with reference to according proper rights to people of a certain color and to people of certain origins. However, because the States have failed it is essential for the Federal Government to step in and say 'These are constitutional rights and they must be accorded to these people'. That is what this bill aims at, the constitutional rights."²⁹

See also 103 Cong. Rec. 9372.

²⁹ Particular weight is to be given statements made by the committee chairman in charge of a bill. *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, *supra*.

However, Representative Alger was still concerned about the broad language of "civil rights" [see 103 Cong. Rec. 9367]. He therefore formally offered an amendment to include in the bill the study of the "right to work", stating [103 Cong. Rec. 9039]:

"The question was brought up in this debate on civil rights, and now I rephrase that to ask, what are civil rights? I asked that here on the floor of the House Friday afternoon, and nobody has told me anything except, under this bill, the right to vote."

Other Representatives agreed, pointing to the title of the bill which stated "further securing and protecting the civil rights". If this was so, why, they asked, did this not include the "right to work"?

At this juncture, Representative Keating made a point of order that the amendment was not germane and that a similar amendment had been ruled not germane the previous year³⁰ [103 Cong. Rec. 9040]. The Chairman, Aime Forand, sustained the point of order and ruled the amendment not germane. He ruled [103 Cong. Rec. 9040]:

"The Chair finds the bill has to do with political rights and the amendment has to do with labor rights."

There then followed a lively discussion as to what the Chairman meant by "political rights". The Chair replied that labor rights were not to be included, that voting was a political right, and that political rights and the right to vote are part of civil rights [*Id.*]. The Chair distinguished religion as a "religious right" when asked whether it was a "political right".

³⁰ H. R. 627 of the 84th Congress had been defeated in 1956. It had been broader than H. R. 6127, additionally requiring studies of sex discrimination and of economic and social aspects of equal protection, which had now been dropped from the bill in 1957. U. S. Code Cong. & Adm. News, H. Rept. 291, 85th Cong., 1st Sess., 1966-1969 (1957).

Later in the debate, Representative Mendel Rivers of South Carolina tried to offer a "right to work" amendment again. Representative Celler objected, stating [103 Cong. Rec. 9385]:

"... the amendment is not germane to the bill. It covers so-called economic rights; it deals with the subject of labor. This is a civil rights bill."

In again ruling the amendment not germane and sustaining the point of order, the Chairman commented [103 Cong. Rec. 9386]:

"The fundamental purpose of the bill now before us is the protection of civil rights with particular reference to the right to vote. The amendment offered by the gentleman from South Carolina deals with an economic right, the right of an individual to obtain and hold employment."²¹

It is thus plainly evident that the House considered the words "civil rights" to have a limited meaning—and explicitly ruled that so-called "economic rights" were not included in the bill. Obviously, "rights" to AFDC payments for welfare are no more than "economic rights". There is not a hint anywhere in these debates that Congress was opening the jurisdiction of the federal courts to consider anything other than voting rights cases. To the extent that the House even considered § 1343(4), it was indeed as "technical" as the House Report said it was.

When the proposed bill was presented in the Senate after passing the House, the debate centered around Part III, the section containing § 1343(4). Far from deciding to

²¹ This led Representative Rivers to facetiously suggest that the title "Civil Rights Act" was inappropriate and should be changed to the "Celler-Keating Political Act of 1957." [103 Cong. Rec. 9386.]

expand federal jurisdiction, the debate reflected the fear of the Senate that Part III of the bill was too broad and that the bill should be limited solely to voting rights. See 103 Cong. Rec. 11974-11977.³² The Senate was additionally concerned that section 1993, allowing the use of armed forces to enforce the Civil Rights Act, could be used to enforce what was considered to be the ambiguities of Part III of the bill. [See 103 Cong. Rec. 11980, remarks of Senator Hubert Humphrey.]

In the light of these concerns, Senator Francis Case of South Dakota proposed that instead of eliminating all of Part III, it would be best to eliminate only the substantive part, § 121, and retain § 122, the procedural part and the present language of § 1343(4), renumbered as § 121. He then stated his reason [103 Cong. Rec. 11980]:

“May I simply add that *the effect of section 122 is to preserve the protection of the voting rights and the right to sue in Federal Court to secure relief for deprivation of voting rights, which is in harmony, I think, with the tenor of the Senator's [referring to Senator Anderson] address.*” (Emphasis added)

Senator Case then submitted an amendment to change the caption of § 1343—to delete the period (.) after “Civil Rights” and to insert [*Id.*]:

“Sec. 1343. Civil Rights and elective franchise.”

There can thus be no doubt that the only purpose of preserving § 122 of Part III of the bill, should § 121 be eliminated, was to ensure jurisdiction in the federal courts solely for voting rights cases.

³² Senator Anderson reflected the prevailing feeling among the opposition in that he did not know what Part III meant. He thus proposed eliminating Part III and requested [103 Cong. Rec. 11980]:

“Let us act now to protect voting rights, forcefully, and so there can be no question.”

However, the debate on Part III continued, with many Senators expressing fears that this section implementing § 1985 had a potential of going beyond anything Congress would intend. Senator George Aiken of Vermont, in warning that Part III may go beyond the protection of voting rights, stated [103 Cong. Rec. 11981]:

"It has been represented to me that conceivably it could go into the matter of social security, and that it might result in the Federal Government undertaking to force uniform State laws so far as social security and unemployment payments were concerned."
(Emphasis added)

Senator Aiken thus joined with Senator Clinton Anderson of New Mexico in proposing an amendment to strike out Part III [see 103 Cong. Rec. 11998]. The two senators then joined with Senator Case in proposing to retain the jurisdictional provision of Part III that limited federal jurisdiction solely to voting rights cases. See 103 Cong. Rec. 11998, 12284, 12545, 12565.

The chief supporter of Part III was Senator Jacob Javits of New York. He believed that Part III did go beyond the protection of voting rights in that it protected all rights covered by the equal protection language of section 1985 [see 103 Cong. Rec. 12076-12077]. Senator Aiken thus asked Senator Javits if he would be willing to agree to a revision of Part III to make it plain that it referred only to speeding up integration and [103 Cong. Rec. 12077]:

"also insert language making it absolutely plain that Part III could never be used to invade other fields, such as social security, benevolent rights, and other things of that nature."

Senator Javits replied that he did not believe the "purpose, intent or, indeed, the construction of Part III [is] to lead the Federal Government into all the fields enumer-

ated." [103 Cong. Rec. 12077.] It thus becomes clear that not even the supporters of Part III had even an inkling that any section of Part III could ultimately give the federal courts jurisdiction over welfare cases.

When the Anderson-Aiken proposal to eliminate Part III came up for debate, Senator Anderson stated that he had conferred with Senator Case of South Dakota and decided to limit his amendment to striking only section 121 of Part III. Senator Case noted that his first amendment would have transferred § 122 [§ 1343(4)] from Part III to Part IV, but that he later submitted an amendment that would preserve § 122 in Part III and that the Anderson amendment does this. [*Id.*] In joining the Anderson-Aiken amendment, Senator Case specifically stated his purpose in retaining § 122 [*Id.*]:

"It deals *wholly* with the *establishment of jurisdiction for Federal courts to entertain suits relating to the right to vote.*" (Emphasis added)³³

The Anderson-Aiken-Case amendment thus was debated. The opponents of the amendment made a strong effort to save all of Part III by attacking the valuelessness of the jurisdictional provision remaining in Part III. Thus Senator Humphrey stated [103 Cong. Rec. 12557]:

"I consider striking section 121 from the bill the same as deleting all of Part III, because *all that would there*

³³ Senator Aiken stated that the effect of the modification would be "to permit members of the Senate to vote for the Knowland-Humphrey amendment [to repeal section 1993], and then to vote to strike the objectional (sic) portion of part III without embarrassment" [103 Cong. Rec. 12284]. While it is unclear as to what Senator Aiken meant, it appears that he was implying that certain members felt that § 122 would be needed to fully enforce all federal action in the area of voting rights. Certainly, Senator Aiken was not *sponsoring* an amendment to provide jurisdiction in social security cases after it had been he who had stated his fears that the bill might conceivably cover social security and then had to be reassured by Senator Javits to the contrary.

be left in the emasculated part III would be chapter headings and punctuation which add nothing to existing law." (Emphasis added)

Senator Joseph Clark of Pennsylvania commented [103 Cong. Rec. 12548-49]:

"The amendment would strike out section 121 of the civil rights bill. The rest of part III would thereby be rendered meaningless, as a practical matter." (Emphasis added)

Even Senator Richard Neuberger of Oregon, in stressing the "relatively modest" import of Part III, stated [103 Cong. Rec. 12545]:

"This part of the bill, as all other provisions of the bill, does not add any substantive law or extend Federal jurisdiction in the field of civil rights." (Emphasis added)

Therefore, when the Anderson-Aiken-Case amendment came up for a vote, the Senate was divided into two camps—the supporters of the amendment, who were fearful of an extension of federal jurisdiction in the civil rights area and thus wanted § 121 of Part III eliminated, and the opponents of the amendment, who felt that the Civil Rights Acts should be strengthened and that the retention of only § 122 was meaningless. Just before the vote, Senator Case again rose and explained why he was proposing to leave § 122 in as a continuation of Part III. He stated [103 Cong. Rec. 12559]:

"My intent in proposing the idea of leaving in the bill section 122, remembered as section 121, was to strengthen the so-called right to vote. The section would amend existing law so as to clarify the jurisdiction of the district courts in the entertainment of suits to recover damages, or to secure equitable or other relief

under any act of Congress providing for the protection of civil rights, including the right to vote." (Emphasis added)

Senator Case noted that he was now aware that the right to vote under § 1971 could be enforced through § 1983. However, he further noted that § 1343(4) [§ 122] was not limited to acts under color of state law, "[s]o in that sense" it is "perhaps somewhat broader than existing law." [*Id.*] He then reiterated his concern with the right to vote. The Anderson-Aiken-Case amendment passed by a vote of 52-38 [103 Cong. Rec. 12565].

There is nothing in the legislative history of § 1343(4) that even remotely suggests that its purpose was anything other than a clarification of the jurisdiction of the federal courts as to their powers to hear voting rights cases. The Senator sponsoring the amendment to retain § 1343(4) was concerned solely with strengthening voting rights [103 Cong. Rec. 11980, 12284, 12559]. The senators supporting broader federal powers in enforcing civil rights did not contest Senator Case's interpretation, but called § 1343(4) meaningless. Indeed, the very purpose for the introduction and passage of the Anderson-Aiken-Case amendment was to *eliminate* any potential references in the bill to any powers of the federal government in areas other than voting rights because of a concern that language referring to civil rights might be interpreted too broadly.²⁴ Not only was there no discussion that § 1343(4) could be applied to suits enforcing all federal statutes, including the Social Security Act, but Senator Javits, one of the strongest supporters of the bill, assured the Senate that the bill had nothing to do with social security [103 Cong.

²⁴ Just prior to the passage of the bill, there were comments by Senators Johnson, Knowland and Smith that the bill should be solely a right to vote bill [103 Cong. Rec. 12403-05]. Senator Johnson read into the record a New York Times editorial asking that the bill be limited to the right to vote so that it would have a chance of passing.

Rec. 12077].²² Senator Aiken would be surprised indeed to find out that the amendment that he sponsored in order to assure that state plans concerning social security programs could not be affected by the bill [103 Cong. Rec. 11981], instead turned out to grant to the federal courts increased jurisdiction to affect these very state plans. See *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) [Court will look to intent of sponsors of a bill in determining its meaning].

Petitioners have ignored almost all of this legislative history and instead indulge in fanciful speculation as to what the Senate intended in passing § 1343(4). To the extent that § 1343(4) "extends" the jurisdiction of the district court, it does so in allowing the district court to hear constitutional and equal rights claims as to acts perpetrated by private individuals. See 103 Cong. Rec. 12559. Cf. *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 412. However, there was obviously no intention to extend the subject matter of federal jurisdiction to anything other than voting cases. This is clear from the amendment to the catch line of § 1343 set forth in § 122 of the bill, which added the words "and elective franchise" to the heading "Civil Rights". See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) [Heading of section important when it sheds light on an ambiguous phrase in a bill].

Far from extending the term "civil rights", Congress apparently was unsure whether the full panoply of voting rights was even included in § 1343(4), which spoke only of rights secured by the Constitution and Acts of Congress protecting equal rights. Here Congress was enacting a specific statute dealing with voting rights; it would have

²² It must be noted that the bill introduced and passed in 1957 specifically eliminated the language in Part I referring to the power of the Civil Rights Commission to investigate "economic and social" aspects of equal protection, which had been included in the bill passed by the House but defeated in the Senate in 1956. See U. S. Code Cong. & Adm. News, H. Rept. 291, *supra*, at p. 1968.

to fall under the heading of an equal rights act in order for there to be federal jurisdiction under the language of 1343(3). Voting rights may have been considered a grey area of "equal rights", and Congress wanted to make sure that the federal courts could hear *all* voting rights cases that it was authorizing to be brought by the Attorney General.³⁶ Cf. 103 Cong. Rec. 12559 [the purpose of 1343(4) was to "clarify" federal jurisdiction]. Therefore, it adopted the language "civil rights, including the right to vote", where the term "civil rights" referred to all of the constitutional and statutory rights included in section 1343(3), and included the right to vote. In the light of the legislative history of § 1343(4), there can be no other way to interpret this provision.³⁷

The result is that when petitioners retreat to their verbalistic argument [see pp. 40-41, *supra*] that section 1983 itself is an "Act of Congress providing for the protection of civil rights, including the right to vote", they are creating a hypothesis that has no relation to reality. This was the very type of claim raised in *Moor v. County of Alameda*, *supra*, where the petitioners attempted to obtain federal jurisdiction over suits against municipalities through an ingenious interpretation of the literal language of § 1988. This Court rejected the argument by looking to the legislative history of section 1983, which indicated that the interpretation suggested ran contrary to what Congress

³⁶ This would explain why Congress felt it necessary to amend § 1343 despite the existence of 28 U.S.C. § 1345. The jurisdiction provided there for suits brought by the Attorney General was qualified by the words "[E]cept as otherwise provided by Act of Congress."

³⁷ Since Congress felt it necessary to specifically add a reference to voting rights in § 1343(4), it obviously considered § 1343(3) to have a limited meaning. Petitioners' claim that § 1343(3) incorporates the entire spectrum of federal law under § 1983 [Pet. Brief, pp. 50-59] thus becomes frivolous.

had intended. This Court stated [411 U.S. at 709]:

"For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, *we must construe the statute in light of the impressions under which Congress did in fact act. . . .*" (Emphasis added)

In 1957, Congress was acting to pass a very narrow voting rights bill in an effort to placate the South and avoid a filibuster in passing the first Civil Rights Act since Reconstruction.³³ The Senate was so sensitive to any expansion of federal jurisdiction over the states that it unanimously voted to repeal section 1993 (allowing the use of armed forces to protect civil rights) so that the bill would have a chance of passing. The Senate was so unsure about the scope of the equal protection language of § 1985 that it struck the enforcement section pertaining to that statute from the bill because it feared it would encompass areas greater than voting rights and thus infringe on traditional states rights. In the face of this picture of Congress cautiously and tentatively overcoming the opposition of those favoring states rights in passing its first civil rights bill in almost a century, it becomes absurd to claim that Congress surreptitiously sneaked into the bill a provision that gave the federal courts jurisdiction over any state action in the field of social welfare. When the history of section 1343(4) is looked at "in light of the impressions under which Congress did in fact act", *Moor v. County of Alameda, supra*, it can be seen that no such meaning could possibly be attributed to § 1343(4). See also *Richards v. United States*, 369 U.S. 1, 11 (1962) [holding that it is "fundamental" that a section of a statute should not be read in isolation from the context of the whole act].

³³ See Eric F. Goldman, *The Crucial Decade—and After*, Vintage Books, 1960, pp. 297-98.

Cases such as *Gomez v. Florida State Employment Service, supra*, and its progeny [see Pet. Brief, p. 40] are thus incorrectly decided, as they never even mention what Congress intended when it passed § 1343(4). See Note, Columbia L. Rev., at p. 1427. Every Court that has indicated its awareness of the legislative history of section 1343(4) has rejected any contention that this section opens up the federal courts to welfare claims under § 1983. See *Rosado v. Wyman*, 414 F. 2d 170, 181 (2d Cir. 1969) (concurrency of *Lumbard, J.*); *rev'd* 397 U.S. 397 (1970); *Almenares v. Wyman, supra*; *Mattingly v. Elias, supra*; *McCall v. Shapiro, supra*.

In the light of the legislative history of section 1343, it is clear that there is no special federal jurisdiction, other than general federal question jurisdiction (28 U.S.C. § 1331), for suits brought alleging violations of the Social Security Act. The Court below thus correctly dismissed the complaint in the absence of a substantial constitutional claim.

D. Congress Explicitly Intended that There Be No Federal Jurisdiction for Social Welfare Suits Arising Under the AFDC Provisions of the Social Security Act.

Having failed to show that § 1343 provides jurisdiction for suits arising under the Social Security Act, petitioners are compelled to finally argue that this Court disregard the clear intent of Congress because petitioners feel it would be wiser and more practical to hear welfare cases in the federal courts. They point to the history of the 1871 Civil Rights Acts as providing a federal forum for certain acts committed under color of state law, and while they state that the assumptions of 1871 are not now relevant, they assert that there are important reasons applicable "today" for this Court to create a federal remedy [Pet. Brief, p. 60]. Whatever these speculations, they have nothing to do with what Congress intended.

When Congress set up the Social Security program in 1935, it created only a program of federal grants-in-aid to states to be used for AFDC recipients. 42 U.S.C. § 601 authorizes Congress to appropriate "for each fiscal year a sum sufficient to carry out the purposes" of "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State," These sums "shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children." The following section (§ 602) enumerates the provisions which State plans must contain in order to be eligible for federal funding. Section 604 permits the Secretary of HEW, after notice and hearing, to find that a State has failed "to comply substantially with any provision required by section 602(a) . . . to be included in the plan," and to "notify such State agency that further payments will not be made to the State until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply." There are no other remedies provided in the Act.

It is thus clear that Congress never envisioned that every controversy arising out of the administration by the states of the AFDC program be heard in the federal courts. The only parties granted the right to initiate any action under this program are the state and federal governments. No federal remedy was contemplated for the individual recipient of AFDC funds. This is in sharp contrast to the remedy provided to an individual recipient of federal funds under the Federal Old Age, Survivors and Disability Insurance provisions of the Social Security Act. Here Congress set forth provisions for hearings before the Secretary and explicitly provided for judicial review of individual

claims in the federal district courts. 42 U.S.C. § 405 (b), (g). If Congress was concerned that the state courts could not adequately protect any federally created rights in the area of individual AFDC claims, it had every opportunity to provide similar jurisdiction. *Cf. Mitchum v. Foster, supra*, 407 U.S. at 242. Congress has always provided original jurisdiction in the federal court without monetary limitation where it felt it was necessary. See e.g. 28 U.S.C. § 1333 (admiralty); § 1334 (bankruptcy); § 1337 (commerce); § 1338 (patents); § 1339 (postal matters); § 1340 (tax actions). See *McClellan v. Shapiro*, 315 F. Supp. 484, 487, fn. 7 (D. Conn. 1970).

Since Congress purposefully did not create a federal remedy for petitioners under the Social Security Act when it had the express opportunity to do so, petitioners cannot ask this Court to carve out a remedy under the Civil Rights Act. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Social Security Act should only be enforced by the remedies prescribed therein. See *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F. 2d 158 (9th Cir. 1950), *cert. den.* 340 U.S. 827, *reh. den.* 340 U.S. 885 (1950). If the Civil Rights Acts were to be construed to provide a remedy for every right created by federal law, the entire framework of legislation which Congress created would be disrupted, since many statutory remedies are carefully designed to meet the complexities peculiar to the act to which they apply. See Note, *Harvard L. Rev., supra*, at pp. 1291-92, 1293, fn. 41.

By providing for the individual States to formulate their own plans subject to HEW approval, Congress clearly intended that the administration and enforcement of the AFDC programs be with the States. Indeed, this Court has continually emphasized the broad discretion States have in administering these welfare programs. See e.g. *Dandridge v. Williams, supra*; *Rosado v. Wyman, supra*. Substantial state monies are involved in the AFDC pro-

gram. See 42 U.S.C. § 603. If the conclusion urged upon this Court by petitioners is adopted, every single social welfare claim could be brought in the federal courts, as the requirement of HEW's approval of state plans guarantees that a cause of action can be stated under the HEW regulations. There is no indication whatever that Congress intended that each and every minor dispute involving, e.g., whether an individual recipient received a proper check, must be heard in federal court—and without the utilization of any of the state administrative remedies set up for the very purpose of correcting minor administrative errors. *Cf. Carter v. Stanton, supra.*

Petitioners are aware that their interpretation gives the federal courts original jurisdiction over just about every welfare claim. They suggest that Congress would act to narrow this jurisdiction after having its entire legislative scheme thrown out by the courts [Pet. Brief, p. 78]. This is reverse reasoning. It is the intent of Congress that controls considerations of social policy, not the intent of petitioners. If Congress believes that the federal courts should today have jurisdiction of every welfare claim, it can readily do so by amending the Social Security Act in the same manner that it has always done throughout its concern with social welfare. The problems that petitioners believe exist in the current AFDC program [Pet. Brief, pp. 59-63] would form the basis of the very legislative facts that Congress would have to consider in devising a remedy consistent with the complexities of the State and federal administrative and judicial systems.

It is clear that Congress never intended to create jurisdiction in the federal courts for claims arising under the AFDC provisions of the Social Security Act. It did not so intend in 1935, when it passed the Act specifying federal jurisdiction in areas other than AFDC programs; it did not so intend in 1957, when it clarified federal jurisdiction over voting rights cases; it clearly did not so intend

in 1871, when the concept of a federally financed social welfare system did not exist. In the absence of any Congressional intent whatever, this Court should not accept petitioners' tortured verbalistic analysis of § 1343 as providing federal jurisdiction for claims that were never contemplated to be heard in the federal courts.

CONCLUSION

The order of the Court below should be affirmed.

Dated: New York, New York, October 5, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent,
Abe Lavine

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
of Counsel

